TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 216

ALGOMA PLYWOOD AND VENEER COMPANY,
PETITIONER,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED AUGUST 11, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

INDEX

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Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

8-11 PETITION (Omitting formal parts)

8 Now comes the Wisconsin Employment Relations Board, the petitioner above named, by John E. Martin, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, and for cause of action alleges and shows to the court:

1. That the Wisconsin Employment Relations Board, hereinafter referred to as the board, is and at all times mentioned herein, was an adminis-

Page of Record

trative body created by Ch. 57 of the Laws of 1939 as amended by Ch. 515 of the Laws of 1939, Ch. 465, Laws of 1943 and Chs. 424 and 504 of the Laws of 1945.

2. That the Algoma Plywood and Veneer Company (hereinafter referred to as the company or the employer) is a corporation authorized to do business in the State of Wisconsin and is engaged in the manufacture of wooden products, having its plant located in the City of Algoma, Kewaunee County, Wisconsin; and that said company usually transacts business in said county.

3. That Victor Moreau is a resident of the City of Algoma, Kewaunee County, Wisconsin and until the 14th day of January, 1947 was an employee of the Algoma Plywood and Veneer Company.

9 4. That on or about January 27, 1947 said Victor Moreau filed a complaint with the board charging the above named respondent with having engaged in unfair labor practices within the meaning of sec. 111.06, Wisconsin Statutes, as more fully appears by the record of the proceedings of the board filed herein in the Circuit Court for Kewaunee County.

5. That after due notice and hearing upon said complaint, the board did on the 30th day of April, 1947, make and file its decision, findings of fact, conclusions of law and order with reference to said charges of unfair labor practices, a true and correct copy of which is attached hereto, marked Exhibit A and made a part hereof.

Page of Record

6. That copies of said decision, findings of fact, conclusions of law and order, Exhibit A, were duly served upon the respondent above named; that said order since its issuance has been in full force and effect; that the respondent has not within the time required in said order notified the Wisconsin Employment Relations Board in writing what steps it has taken to comply therewith; that the board is informed and believes that the said respondent has failed and neglected to take any steps to comply with the terms of said order and alleges that said respondent has wholly failed and neglected to comply with the cease and desist provisions of the order or the affirmative action requirements and provisions thereof; that on the contrary said respondent contends that said order is invalid and has petitioned to have the same set aside and further contends that the respondent is under no obligation to comply with the said order.

7. That the said board has caused to be certified and filed in this courts its record in the proceedings entitled

Page of Record

"Victor Moreau, R. #1, Algoma, Wis.
represented by J. J. Gray, 6138
Plankinton Building, Milwaukee, Wis.,
Complainant,

v.

Algoma Plywood and Veneer Company,
Algoma, Wisconsin,
Respondent.

Case II, No. 1565 Ce-222, Decision No. 1291" all documents and papers on file in the matter, the pleadings and testimony upon which the order therein was entered and the findings and order of the board to which record reference is hereby made and the same is incorporated herein as if specifically set forth.

WHEREFORE the board prays that the court enter a judgment and decree confirming and enforcing all of the provisions of the order herein referred to, Exhibit A, and for such other relief as the facts and circumstances may warrant.

Dated May 22, 1947.

11-14 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF WISCONSIN EMPLOYMENT RELATIONS BOARD (Omitting formal parts)

11 The above entitled matter having come on for hearing on the 21st day of February, 1947, before the Wisconsin Employment Relations Board, Chairman L. E. Gooding and Commissioner J. E.

Page of Record

Fitzgibbon being present, the Board having heard the testimony, and being advised in the premises, does hereby make and file the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. That Victor Moreau is a resident of Algoma, Wisconsin, and until the 14th day of January, 1947, was an employe of the respondent, Algoma Plywood & Veneer Company.

2. That the respondent, Algoma Plywood & Veneer Company, hereinafter referred to as the Company, is a corporation authorized to do business in the State of Wisconsin, and is engaged in the manufacture of wooden products, having its plant located in the City of Algoma, Wisconsin.

3. That the intervenor, Local No. 1521, Carpenters and Joiners of America, affiliated with the American Federation of Labor, and hereinafter referred to as the Union, is an unincorporated labor organization having its principal office in the City of Algoma, Wisconsin.

4. That on the 5th day of April, 1946, the Company and the Union entered into a collective bargaining agreement which provided that such agreement should become effective on the 29th day of April, 1946 and remain in effect for a period of one year from the 29th day of April, 1946, and shall automatically be renewed from year to year

Page of Record

thereafter unless the party desiring to terminate the contract shall give to the other party thirty (30) days written notice before the expiration of any year, of its desire to terminate the contract.

12 5. That Article 1 of said agreement provided among other things:

> "All employes who, on the date of the signing of this agreement, are members of the union in good standing in accordance with the constitution and by-laws of the Union, and those employes who may thereafter become members shall, during the life of the agreement as a condition of employment, remain members of the Union in good standing."

6. That the complainant, Victor Moreau, failed to maintain his membership in good standing in the Union by failing and refusing to pay dues as required by the Union.

7. That on the 7th day of January, 1947, the complainant Moreau was notified by the Union of such arrearage in his dues and that unless this arrearage was taken care of before Monday, January 13, that he would no longer be allowed to work and would also be fined $1.00.

8. That on January 14, in the morning, he was directed to report to the office of the Company. There were present the Vice President and Factory Manager, Mr. Fulwiler, representing the Company and the Chairman of the Grievance Committee, representing the Union. At that con-

Page of Record

ference the complainant announced that he would quit his job rather than pay any dues to the Union; whereupon he was advised by the Vice-President of the Company to punch out.

9. That no referendum pursuant to Section 111.06 (1) (c) of the Wisconsin Statutes, has ever been conducted by the Wisconsin Employment Relations Board for the purpose of giving the employes of the employer an opportunity to approve the inclusion of any type of "All-Union" agreement provisions in any collective bargaining agreement between the parties.

Upon the basis of the above and foregoing Findings of Fact, the Board makes the following

CONCLUSIONS OF LAW

1. That the inclusion in the collective bargaining agreement between the Company and the Union of a provision requiring all employes who were members of the Union in good standing at the time of the signing of the collective bargaining agreement must maintain their membership in that Union as a condition of employment encouraged membership in Local No. 1521 of the Carpenters and Joiners of America, and is in violation of Section 111.06 (1) (c) of the Wisconsin Statutes.

2. That by requiring and attempting to require all employes of the company who were members

Page of Record

in good standing in the Union on the date of the signing of the agreement to maintain their membership in good standing as a condition of employment with the Company, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 111.06 (1) (c) of the Wisconsin Statutes.

3. That the termination of employment of Victor Moreau was brought about by reason of his failure to maintain his membership in the Carpenters & Joiners of America, Local No. 1521, and constituted discrimination by the company in regard to the hire or tenure of employment of said Victor Moreau.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Board, pursuant to Section 111.07 (4) of the Wisconsin Statutes, makes the following

13

ORDER

IT IS ORDERED that the Algoma Plywood & Veneer Company, its officers and agents, shall immediately:

1. Cease and desist from

(a) Encouraging membership in Local No. 1521, Carpenters & Joiners of America, affiliated with the American Federation of Labor by discriminating in any man-

ner with the hire or tenure of its employes whether they are or are not members in good standing in such labor Union.

(b) Encouraging membership in Local No. 1521, Carpenters and Joiners of America, or any other labor organization, by requiring as a condition of employment that any employe become or remain a member of any such labor organization, as a condition of employment unless and until the employes approve such provision by a referendum as provided in Section 111.06 (1) (c) of the Wisconsin Statutes.

2. Take the following affirmative actions which the Board finds will effectuate the policies of the Act:

(a) Offer to Victor Moreau immediate and full reinstatement to his former, or substantially equivalent, position without prejudice ot his seniority or other rights or privileges.

(b) Make whole Victor Moreau for any loss of pay that he may have suffered by reason of the company's discrimination against him, by payment to him of a sum of money equal to the amount he nor-

Page of Record

mally would have earned in wages during the period from the date of his discharge to the date of the company's offer of reinstatement, less the net earnings and unemployment compensation he may have had during such period.

(c) Post at its plant at Algoma, Wisconsin, copies of the Notice attached hereto marked Exhibit A. Copies of said notice shall be prepared by the employer, signed by the employer's representative and posted by the employer immediately upon receipt of a copy of this order, and maintained by it for thirty (30) consecutive days thereafter in conspicuous places, including all places where notices to employes are customarily posted.

(d) Notify the Wisconsin Employment Relations Board in writing within five (5) days from the date of receipt of a copy of this order what steps the employer has taken to comply therewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of April, 1947.

Page of Record

14

EXHIBIT A

NOTICE TO ALL EMPLOYES

Pursuant to an order of the Wisconsin Employment Relations Board, we hereby notify our employes that we will not in any manner interfere with their rights to self-organization and to form, join or assist any labor organization of their choice. That we will not require any of our employes to become or remain members of Local No. 1521, Carpenters and Joiners of America, affiliated with the American Federation of Labor, or any other labor organization as a condition of employment; that we will not enforce or attempt to enforce any provision contained in any written collective bargaining agreement between our company and Local No. 1521, Carpenters and Joiners of America, affiliated with the American Federation of Labor, which requires as a condition of employment that all employes who were members of such union on the 5th day of April, 1946, or have since become members of such union, must maintain their membership in good standing; we will offer to Victor Moreau immediate and full reinstatement to his former, or substantially equivalent, position without prejudice to any seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of such discrimination.

Page of Record

All of our employes are free to join or assist labor organizations of their choice, or to refrain from such activities. All of them are free to become and remain members of Local No. 1521, Carpenters and Joiners of America, or any other labor organization, or to refrain from any organizational activities. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employe because of membership in or activities on behalf of any labor organization, or the failure to maintain membership in any labor organization.

ALGOMA PLYWOOD AND VENEER COMPANY

By .....

16-106 PROCEEDINGS BEFORE WISCONSIN EMPLOYMENT RELATIONS BOARD

19-20 Complaint (Omitting formal parts)

19 The Complainant above named complains that the Respondent has engaged in and is engaging in unfair labor practices contrary to the provisions of Chapter 111 of the Wisconsin Statutes, and in that respect alleges: that on January 14, 1947, Victor Moreau was discharged. On the morning of January 14th, Mr. Moreau was called into the office of Ray R. Fulwiler, an official of the Company, and a number of other employees were

Page of Record

called in for non-payment of dues. They all agreed to pay their dues with the exception of Mr. Moreau who refused to pay dues into the organization. Mr. Smith, a representative of the union, was also present and he said, "I am sorry, Victor, but this is the rule," and Mr. Fulwiler asked Mr. Moreau what he was going to do about it. Mr. Moreau stated he would not pay any more dues. Mr. Fulwiler then told him to punch out and go home.

Submitted by: John J. Gray

John J. Gray, representing Victor Moreau

An unfair labor practice is based upon the fact that no election has been held to determine a maintenance of membership clause by the Wisconsin Employment Relations Board between the Carpenters and Joiners, AFL Local 1521, and the Company. The maintenance of membership clause contained in the contract is as follows:

> "All employees who on the date of the signing of this Agreement are members of the Union in good standing in accordance with the Constitution and By-Laws of the Union and those employees who may thereafter become members shall during the life of the Agreement as a condition of employment remain members of the Union in good standing."

Page of Record

20

MEMORANDUM

January 23, 1947

In the year of 1937, the Carpenters and Joiners AFL Local 1521 organized the workers at the Algoma Plywood and Veneer Company, Algoma, Wisconsin. In the fall of 1938, an independent union took over the representation of the employees in the above-mentioned company. There was no election held by any government agency in this matter. The Carpenters and Joiners Local 1521 petitioned the National Labor Relations Board for representation of the workers in the Algoma Plywood and Veneer Company and a hearing was held in Case No. 12-R-449, and an election was ordered by the Board at which time the AFL Local No. 1521 won the election. A contract was negotiated which did not contain any maintenance of membership clause. In 1943, after negotiations were started for a new contract, the union petitioned the National War Labor Board to settle a labor dispute which existed. A hearing was held and the War Labor Board instructed the company, among other things, to sign a contract embodying a maintenance of membership with a 15-day escape clause. Early in the year of 1942 the Algoma Plywood and Veneer Company petitioned the Wisconsin Employment Relations Board for an election to determine an all-union shop. The Company later withdrew their petition and the Board dismissed the case on April 3, 1942.

Page of Record

On January 14, 1947, Victor Moreau was discharged. On the morning of January 14th, Mr. Moreau was called into the office of Ray P. Fulwiler and a number of other employees were called in for non-payment of dues. They all agreed to pay their dues with the exception of Mr. Moreau who refused to pay dues into the organization. Mr. Smith, a representative of the union, was present and he said, "I'm sorry, Victor, but this is the rule" and Mr. Fulwiler asked Mr. Moreau what he was going to do about it. Mr. Moreau stated he would not pay any more dues. Mr. Fulmiler then told him to punch out and go home.

On January 15, 1946, Harry E. Jones and John J. Gray called at the company's offices in Algoma, Wisconsin, and discussed the matter of the discharge of Victor Moreau with Mr. Charles G. Yerkes, President of the company, together with Ray P. Fulwiler. The company's position was that they did not discharge Mr. Moreau, but that he voluntarily quit. Our position was that the maintenance of membership clause in the contract was illegal in view of the fact that no election has been held to decide the maintenance of membership or an all-union shop with the said company and that the company was in violation of the law in calling in said employees to the office to force them to pay their dues. Both Mr. Yerkes and Mr. Fulwiler admitted that the maintenance of membership clause was illegal, but stated that it had been ordered on them by the War Labor Board against their

Page of Record

wishes and that we could rest assured that when the contract again came up that this matter would be settled by the Wisconsin Employment Relations Board. Mr. Yerkes' position was that he was caught between two fires; that he either had to violate the laws of the State of Wisconsin or violate his contract, and that he preferred that this matter be referred to the Wisconsin Employment Relations Board for determination.

22-57 TRANSCRIPT OF TESTIMONY BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

23 Pursuant to notice, the above entitled matter came on for hearing before the Wisconsin Employment Relations Board in the Lounge Room, Manitowoc County Court House, Manitowoc County, Wisconsin, on February 21st, 1947, commencing at 10:00 A. M.

Present:
Chairman L. E. Gooding
Commissioner J. E. Fitzgibbon

Appearances:
Complainant, by Mr. John Martin, Attorney at Law, Milwaukee, Wisconsin

Respondent, by Whyte, Hirschboeck & Minahan, Attorneys at Law, by Mr. Roger C. Minahan, Milwaukee, Wisconsin.

Page of Record

Local 1521, Carpenters and Joiners, A. F. L., by Padway, Goldberg & Previant, Attorneys at Law, by Mr. Saul Cooper, Milwaukee, Wisconsin

WHEREUPON the following proceedings were held:

CHAIRMAN GOODING: Now, we have two matters here. The first one is one in which Victor Moreau is Complainant and the Algoma Plywood and Veneer Company is Respondent, and one which is a petition for an election among the employees of the Algoma Plywood and Veneer Company filed by the employer. I think properly we should first take up the unfair labor practice complaint.

MR. COOPER: May I make a statement, Mr. Gooding? We aren't a part of the pleadings here, and on behalf of the Carpenters we'd like to intervene and state our position. I don't have any written reply or answer, Mr. Chairman, but I can state my statement into the record.

24 CHAIRMAN GOODING: All right.

MR. COOPER: Our first defense, of course, is that the maintenance of membership contract involved in proceedings here is a legal one; that this contract was entered into before the present law was enacted, and that the contract is actually a renewal of pre-existing contract, and it is a substance of the contract, of course, which will guide rather than its form, and that if this contract is

Page of Record

interpreted as conflicting with the present law, then such present law so interpreted is unconstitutional.

* * * And there has been no answer filed on behalf of the Company either; is that right, Mr. Minahan?

MR. MINAHAN: That is correct. I'd like to state the position of the Company at this time.

CHAIRMAN GOODING: All right.

MR. MINAHAN: With reference to the Moreau complaint, the company's position is that it denies that the complainant Moreau was discharged by the employ—from the employ of the Company, and takes the position that he voluntarily quit the employ of the Company. Secondly, that the maintenance of membership clause is a legal provision not invalid under the Wisconsin law for the reason that this contract was merely a continuation and a renewal of pre-existing contracts entered into originally first in 1943. I think that is all of our position with respect to that.

MR. MARTIN: The position of the C. I. O., of course, is that the maintenance of membership provision does not conform to the requirement of the Wisconsin Statute as amended in 1945, which required all or any of the employes to determine that by a referendum vote whether or not they wished to be represented by a union, and further that Mr. Moreau was discharged by the Company because of his failure to comply with that provision in the contract which covered main-

Page of Record

tenance of membership, and that Mr. Moreau of course is entitled to reinstatement and reinstatement with back pay, because the provision of the contract is inoperative in that it doesn't conform with the Wisconsin law.

25 CHARLES G. YERKES, being first duly sworn on oath testified:

DIRECT EXAMINATION BY MR. MARTIN:

I am the president of Algoma Plywood and Veneer Company. Local 1521, Carpenters and Joiners of America are the collective bargaining representative for the company's employees and have been since 1942. There was an election held in 1942 by the National Labor Relations Board in which they were certified as the exclusive bargaining agents. The Carpenters' union represents all employees of the Algoma Plywood and Veneer Company except for administrative, executive, supervisory and office employees. It covers all production employees. We entered into written
26 contracts with the Carpenters and Joiners after 1942. The first contract was entered in April 1942. It did not have a maintenance of membership clause. The maintenance of membership provision of the contract was put in in 1943. During the bargaining procedure, the union had many points that they wished to incorporate in the new contract. One of them was maintenance of member-

Page of Record

ship. It had not been in before and we asked the United States Department of Labor for a conciliator in order to bring us up to date on laws. They assigned John Lucke, a man from Escanaba. Lucke advised us in the proceedings to put in the maintenance of membership clause, stating that President Roosevelt had agreed with all unions as a part of a no-strike pledge to include maintenance of membership and that if we did not put it in, it would be put in by the War Labor Board anyhow. The case went to the War Labor Board in which we submitted our whole contract including the maintenance of membership clause. It was approved and sent back in a directive from the Chicago district office of the War Labor Board. There was no appeal from that directive.

27 From that time on the maintenance of membership clause was considered a part of the contract and was written therein. We have an annual contract. Each year since 1943 maintenance of membership has been included in the contract.

There was no check-off of dues. It was the union's duty entirely to notify us when their members were not in good standing. As a matter of fact, the union did from the time of the directive order inform us when employees were not in good standing. The unions have a constitution and by-laws in which they define good standing. We left entirely to them as to who is in good standing; that is part of our contract. I am not familiar with the constitution and by-laws of the union. I have

Page of Record

inquired in a general way as to what good standing may have meant. In our bargaining proceed-
28 ures, we have inquired as to what is meant by good standing. What we understand membership in good standing to mean is that a man must not be delinquent in his dues; that his assessments must be paid or any financial obligation to the union must be paid. The second point was that his conduct would be such that he was considered a member of the union and not to do anything against the general laws of the country. It is entirely up to the union what length of time a man would have to be delinquent before he ceased being in good standing. There was never any understanding between the company and the union with respect to that.

A certification that the union would give as to a member not being in good standing was sufficient from the company's standpoint. We take the position that the union and members know their constitution and by-laws. If his union reports to us that he is delinquent and he is not delinquent, he has the grievance procedure to go through in which it would be necessary to prove that he had violated that so we rely upon the grievance procedure rather than our having any intimate knowledge of the inner workings of the union.

29 The procedure in connection with the certification by the Carpenters that members are not in good standing is: The union would notify the man that he was not in good standing. I presume at the

same time as notifying the company. The way it is actually worked, without getting into the inside of the union which I do not know, they notify men by postal card or another means that they are not in good standing and those men then have the chance to go to their union and either dispute it or not. After the union has determined that the man is delinquent, the company is notified by the union by letter that certain members are not in good standing.

The general procedure then is for the general factory manager, Mr. Fulwiler, to call the man into his office and ask him if he is familiar with that procedure. If the man states that he is and decides to come into good standing, it is a closed incident. Otherwise if he says that he is not going to get in good standing, the normal procedure would be for him to file his answer with the Grievance Committee. Then the Grievance Committee would go into all of the details of it in which the exclusive bargaining agency is represented. The company is represented, the man is allowed to be present, can have anybody with him for witnesses that he wants to. It is an entirely informal hearing in which the man states his case and from that the Grievance Committee makes recommendation to the company. That would be the normal proceeding if it went that far. Any man in our employ can ask for a grievance hearing at any time and get it in one minute's notice. The grievance procedure has to be at the request of the em-

Page of Record

ployee. How else would we know there was a grievance if it wasn't requested?

After the man is called into the office by Mr. Fulwiler and has elected not to put himself in good standing, whether we have reached an impasse would depend upon what action the man would take. If he says "I just elect not to put
31 myself in good standing" which has not occurred, it would go to the Grievance Committee in there in order to keep our normal relations right with the bargaining agent. You are asking a hypothetical question that hasn't been answered and I am not a crystal ball gazer, and I am giving you what would actually happen. After the person had elected not to be in good standing before anything further would take place, the matter would be considered by the Grievance Committee. I don't think I could answer when the Grievance Committee would consider the matter. Pretty definitely it would take place before any further action would be taken on the matter.

The Carpenters' union has certified many times that employees were not in good standing. That is done before they are officially not in good standing. I believe they begin not in good standing of a certain date whenever their dues are due, and there is no definite data in there. It would not be periodical at all. It would be just as the occasion
32 arose. The occasion has arisen. Whether it has arisen very often that is an indefinite term. No one in the life of the contract since 1943 has been

Page of Record

discharged for non-payment of dues because they have paid their dues. No inquiry is made on the part of the company to see that they have paid their dues. We accept the word of the Carpenters
33 and Joiners union that the member is in good standing and wait for a further certification.

There has never been any discussion between the company and the union with respect to taking a referendum in order to comply with the requirements of the state law for a maintenance of membership clause in the contract.

The discharge of Mr. Moreau never took place. He did work for the Algoma Plywood and Veneer Company. I was not present when Mr. Moreau's employment was terminated.

34 CROSS-EXAMINATION BY MR. COOPER:

Well over 95% of our business deals in interstate commerce. Very little of it is done in the State of Wisconsin. The majority is outside.

RALPH FULWILER, being first duly sworn on oath, testified:

DIRECT EXAMINATION BY MR. MARTIN:

I am vice-president and factory manager of the
35 Algoma Plywood and Veneer Company. The circumstances which lead up to termination of Mr. Moreau's employment are: Mr. Eldor Schmidt, chairman of the Grievance Committee, asked me

Page of Record

to sit in with him when he talked to Mr. Moreau. Mr. Moreau was asked up to my office. He came in and I said "Sit down, Victor. You probably know what you are here for." Victor didn't sit down and he says "Yes, I will quit before I pay my dues." He said "I'd be willing to pay $10.00 to a Union that would help me out, but nothing to this one." Mr. Schmidt then made the remark that he hadn't been mistreated, that he was sorry this had to happen. What I mean by "This had to happen" is that Vic had been called up and taken that attitude.

So Vic in the meantime was walking out and I says if he felt that way that he should punch out. If he felt that he had rather quit than pay his dues and that he'd pay $10.00 to an organization, but none to this. When I said that, what I meant was if he was going to quit he should punch out and go home. I said "Then you better punch out
36 and leave the plant." Something to that effect, if you feel that way. There was no elaboration on the expression "If you feel that way." Nothing further took place while Vic was in the office. He was on his way at the time. The whole episode lasted about 30 seconds. There was no discussion with Mr. Moreau in my office after I had called him, nothing further than what you have heard. Mr. Moreau indicated that he understood the situation.

Notice had been given to the company orally on the morning of January 14 that Mr. Moreau was

not in good standing. The company called Mr. Moreau in then. There were three others that were certified at the same time as not being in good standing. The other three were called in on the 14th. I believe they paid their dues and became members in good standing or at least they made arrangements so that the union certified them to us as being in good standing. I did not at any time consider any other action subsequent to a man's electing not to be in good standing. The occasion never arose for a Grievance Committee meeting before the enforcement of the terms of the maintenance of membership clause and I didn't think anything further about it. There had never in my experience been any understanding with the union that such would take place.

Q The understanding was that if a member elected not to remain in good standing that he would be discharged?

MR. MINAHAN: I object to that—assuming it, I mean, is your purpose to ask the question as to whether or not there was such an understanding?

MR. MARTIN: The purpose of my question was to draw from Mr. Fulwiler just what he understood by the application of a maintenance of membership contract—clause of the contract if an employe would elect not to remain in good standing with his Union.

CHAIRMAN GOODING: We are not particularly interested in what he understood.

We are interested in what the contract provides.

MR. MINAHAN: I think that draws for a conclusion.

CHAIRMAN GOODING: Objection sustained.

No one has approached me subsequent to the 14th of January with respect to the discharge of Mr. Moreau. After Mr. Moreau's termination of employment some representative of the United Paper Workers of America, CIO approached us and discussed the matter. I was in Mr. Yerkes' office and there were two representatives of the CIO there. They discussed the matter with Mr. Yerkes. I was a witness. I did not participate.

ELDOR SCHMIDT, being first duly sworn on oath, testified:

DIRECT EXAMINATION BY MR. MARTIN:

I am an employee of the Algoma Plywood and Veneer Company and I am a member of the Carpenters and Joiners union. I am chairman of the Grievance Committee and have been for last year and this year. There was a different fellow, then he become to be a foreman and then put me in again to take his place. As chairman of the Grievance Committee all I have to do is the Financial Secretary gave me a report that he was in arrears

Page of Record

and I was the one to just notify the Company or take it in to them. After I got this report from the Financial Secretary I went up personally and just told him in my own words who of the members of the union is in arrears. There was nothing in writing. I then participated in meetings when members that were in arrears were called into the company's office.

40 When an employee was called into the office because of his ceasing to be a member in good standing what would take place as a rule was: I told Mr. Fulwiler I'd like to send out a notice. Never paid their dues or even answered us or anything so I had Mr. Fulwiler call them in and ask these fellows that they are in arrears. Sometimes they would pay up right away or just the idea I suppose, they had to come in the office and they paid, otherwise they wouldn't have; I don't know. But we never had no trouble till Mr. Moreau walked out.

My understanding of a member not in good standing is if he is three months in arrears in his dues.

41 I had four fellows that were in arrears at the time Mr. Moreau was called into Mr. Fulwiler's office. I asked Mr. Fulwiler to call them. He called them in one at a time and the other three, two of them paid up right away and the other fellow didn't have any money along so he said he would bring it next night which he did. Mr. Moreau came in and Mr. Fulwiler says "Have a chair." and

Page of Record

Vic would not sit down. He just stood there and Fulwiler asked him "I suppose you know what you are in here for?" And he said "Yes." And he says "I will quit before I will pay my dues." He said "I'd sooner belong to an organization and pay $10 a month than to belong to an organization that don't do anything for me." And I said "Vic, we treated you right." And he walked out and Fulwiler, I guess, did make a statement then "You better punch out" when he left and was walking out. That's all that was said.

I told him "We have treated you all right, Victor." I didn't see any reason why we didn't. That is all that was said.

VICTOR MOREAU, being first duly sworn on oath, testified:

42 DIRECT EXAMINATION BY MR. MARTIN:

I was an employee of the Algoma Plywood and Veneer Company. I started about five years ago but off and on stayed home for farming. I think it was a year last October since I started again and worked continuously outside of three weeks when I was sick and a day here and there when I missed. I was a member of the Carpenters and Joiners union. Every time I went back to work they came and found me in the yard and I paid up until this last time. I was not always in good standing in the union with respect to my dues. I

Page of Record

would say the first time I was not in good stand-
43 ing was about a year after I joined. At the time
that I was first not in good standing I was so in-
formed by the Carpenters and Joiners by a card.
I was called into the office and that time Mr. Mer-
cer who was the employment agent I guess called
me in. When I got in the office he wasn't there.
Young Thomas, an office man, was there. He called
up for Mercer. Mercer said "Well, Thomas told
me if you want to punch out you have to go home"
so I put my bags in and I went home. A week or
so later I met Mr. Fulwiler on a corner about a
block from the factory. He said "Why ain't you
working?" I said "The Union pushed me out."
Mr. Fulwiler said "We'll see about that" and a
little after that I got a letter from Mercer to report
for work. I came there and he said "What you
going to do about the dues?" I said "If I got to pay
them, I ain't going to pay them." He said "Why
don't you start new again and pay your $2.00 and
44 start with $1.00 a month again?" I went to a guy
they call "Punkin." I think that was about in 1944.
When I went back to work I paid a $2.00 initiation
fee and started paying dues. I considered myself
a member of the union from then on. The union
did not state anything to me at that time about
making up arrearage. I don't know what year it
was I quit because I had too much work at home
and then in the fall I started working again, and
then I think it was Schmidt here asked me about

Page of Record

the back dues. I said "I will bring them to you." He said "If you bring it in the morning it is all right." The next morning I brought them and said "How much do I owe you?" He said "Nine Dollars." I said "I don't owe you that much back dues. If you need the money, here it is." Then in the afternoon he brought me $3.00 back. He looked the books over and they did overcharge me. That was subsequent to the 1944 period which I previously described.

This year I got a card stating if I didn't pay my money the 13th I was no longer employed there. I didn't pay any attention to it and then on the 14th Charles Dion came to me. He is supposed to be a straw foreman in John Paape's yard. He said that Fulwiler wanted to see me in the office. When I went up there a guy was just walking out and Fulwiler said "I suppose you know why I got you up?" I said "Just about." He said "What you going to do?" I said "I ain't going to pay." He said "Punch out and go home then.' I said "If they had an organization here that treats everybody alike I'd be willing to pay $10.00." Smitty answered "I think they treated you right. I'm sorry, Vic, but that's our rules."

In other words I was told to punch out and go home before I made the remarks that I would pay $10 to an organization but not to this organization. I did not in any way indicate to Mr. Fulwiler or Mr. Schmidt that I was quitting.

Page of Record

The last part of the conversation was when Smitty said "I am sorry, Vic, but that's our rules." Then I left. I punched out at 9:58.

CROSS-EXAMINATION BY MR. MINAHAN:

I got a card that if I didn't pay my dues Monday the 13th would be my last day to work. Exhibit 1 signed by Mary Kostickka is the card I got. I understand she is the Financial Secretary of the Carpenters and Joiners union.

(Exhibit 1 received in evidence.)

CHARLES G. YERKES, testified further:

DIRECT EXAMINATION BY MR. MINAHAN:

I became associated with the Algoma Plywood and Veneer Company in 1943. I came with the company in the middle of the negotiations in April 1943. They had been doing some before I came and they were completed after I came. I came as president of the company. I have negotiated the contracts with the union since that time. Exhibit 2 is the contract which we entered into with the Carpenters and Joiners union in 1942. Exhibit 3 is the copy of the contract which was entered into with the company and Carpenters Union in 1943. That contract is dated in June 1943. It contained the maintenance of membership clause. That clause was negotiated with the union prior to sub-

Page of Record

mission of disputed matters to the War Labor Board. The contract provides that it is to be effective from the 29th of April, 1943. It reverts back to a continuation of the 1942 contract.

Exhibit 4 is a copy of the agreement entered into between the company and the union in 1945.

Exhibit 5 is a copy of the agreement entered into between the company and the union in 1946. Article XII of the agreement of 1943 reads:

> "Term of Contract. This agreement shall become effective as of the 29th day of April, 1943, and remain in effect for a period of one year from that date, and shall automatically be renewed from year to year thereafter unless the party desiring to terminate the contract shall give to the other party thirty (30) days written notice before the expiration of any year of its desire to terminate the contract."

That same provision was incorporated in the
50 rewritten contracts in 1944 and 1945 and in 1946.

The company has never served any notice of termination of any contract with the Carpenters and Joiners union. The union never served any notice of termination of contract to the company. In spite of that fact each year this contract was rewritten. That is because a contract of that kind becomes quite a bulky and unwieldy document if you keep adding amendments to it each year. Under our present economic period and the way it was during the war, there have been changes in wage rates, classifications, vacations and numerous

Page of Record

other articles of that kind, so rather than put amendments to the original 1942 contract, it has been rewritten changing only those articles on which we agree, the balance of the contract kept right on going.

CROSS-EXAMINATION BY MR. MARTIN:

In connection with the succession of contracts, 1943, 1944, 1945 and 1946 according to Article XII, the contract would become effective without changes unless notice had been given thirty days previous to the expiration date. It is a little hard to say whether these changes were made as a result of the notification by the company or the union to the company that it desired changes. In the instance of three years of negotiations, I would
51 say that the union has brought up points which they desired to change. I don't recall and I wouldn't be too positive that the company have had any revisions to make. Notification was given by the union or the company, one to the other, in accordance with the terms of Article XII.

MR. MINAHAN: I object to that question. The witness has already testified no notifications were given under the terms of the contract for termination, which is the only thing it provides for at any time.

CHAIRMAN GOODING: The objection is overruled.

Page of Record

No notification had been given by either side of termination of the contract. The union have asked for bargaining privileges to go over some articles in there, principally wages. * * * In 1943 there were certain items in dispute on this contract that were submitted to the War Labor Board and the War Labor Board directed the company to incorporate in the agreement. The maintenance of membership clause was put into our contract
52 on the advice of the representative of the United States Department of Labor. It finally developed in there that the whole contract should be submitted to the War Labor Board, including the articles that were in dispute and they passed upon the whole contract. They approved the maintenance of membership. We have not agreed upon it prior to the submission to the War Labor Board. It was an article that was not in 1942 and we disputed putting it into the contract but on the advice of the Department of Labor it was included in there, and submitted to the War Labor Board for approval or removal.

REDIRECT EXAMINATION
BY MR. MINAHAN:

The union made a demand in 1943 for the inclusion of the maintenance of membership clause. The company did not immediately grant that demand. Sobsequently a representative of the Department of Labor, Conciliation Service, attempt-

Page of Record

ed to further the negotiations and he advised us on the question of the inclusion of this clause in the agreement. He said it was a part of the War Labor Board policy backed by a number of deci-
53 sions that they had made in similar cases in which they had put it in. He stated that it would very definitely be put in by the War Labor Board whether it were written into the contract or not and we asked that the whole contract be submitted to the War Labor Board for their approval or disapproval. We finally agreed upon the inclusion of the maintenance of membership clause because it was our understandigg that there was no question but what it would be ordered by the War Labor Board when the matter was submitted to them.

RALPH FULWILER, being recalled, testified:

DIRECT EXAMINATION BY MR. MINAHAN:

I am the vice president and factory manager of the Algoma Plywood and Veneer Company. In that capacity I have over-all supervision of the personnel in the production department. The practice wtih respect to disposition of problems between the union and members of the union or employees in the plant has been: An employee with a grievance sees one of the Grievance Committee and this covers not only the members of the union but the non-members that come through

Page of Record

the Grievance Committee. Then we meet twice a month. The Grievance Committee meets with me and Mr. Mercer our superintendent. These grievances come either in writing or verbally, any
54 way they feel like putting them to us. The entire meeting is strictly informal; notes are being taken and a report is made when we are through. We discuss each item and make our decision. Sometimes we agree; sometimes we don't. There are times when we haven't agreed and it has come up two or three times and in subsequent grievance meetings, sometimes change is made and sometimes it isn't. At the conclusion of the meeting of the Grievance Committee with Mr. Fulwiler and myself we always take some official action on behalf of the company either granting the request or denying it. I don't think we have ever had a meeting where nothing came up. The report is typewritten and a copy is given to the chairman of the Grievance Committee, who takes it to the union meeting, as I understand it, and reads the dispositions made.

The union never certified anyone not in good standing. They customarily reported to us informally that someone was not in good standing. Our practice in that case was to meet with the chairman of the Grievance Committee and try to talk things over with the employees that were not in good standing. Naturally we liked to keep the
55 help we have and it was my point to try to keep them on the job. I cannot recall the incident at all

Page of Record

of meeting Mr. Moreau in the street and asking him why he wasn't working. I just don't recall it.

The company has never discharged an employee for failure to maintain his standing with the union.

CROSS-EXAMINATION BY MR. MARTIN:

I was familiar with the fact that Mr. Moreau stopped work from time to time to be on the farm or matters of that kind. I am familiar with occurrences when Mr. Moreau's employment was terminated previously but I wouldn't know the day it happened, don't you see. It would come to me indirectly from the superintendent probably a day later or two or three days later. I wouldn't be in on the direct incident. I don't recall the reason for the termination of Mr. Moreau's employment previously of which he spoke. I remember talking to Vic probably the time he mentioned in his testimony, but what was said and what was done, I don't recall. He left our employ three times and returned three times and that goes over a period from 1942 on. I can't very well remember that.

56 REDIRECT EXAMINATION
BY MR. MINAHAN:

The hiring of labor in the plant is my responsibility only indirectly. I supervise the department that hires personnel. We have approximately 650 employees in our production department at the present time. The Algoma Plywood and Veneer Company is the largest employer of labor in Al-

Page of Record

goma, Wisconsin. Algoma is a city of approximately 3,000 or 3,200 people.

58 EXHIBIT 1 (Postcard dated January 7, 1947 from Financial Secretary of Local 1521 to Victor Moreau) (Omitting formal parts)

You are in arrears with your dues. Please take care of these on or before Monday, Jan. 13 or this will be your last day at work and you will also be fined $1.00.

80 Article I. EXHIBIT 5 (Agreement) (Omitting formal parts)

* * *

The Company recognizes the Union as the exclusive bargaining representative of the Company's employees in its Algoma, Wisconsin, plants exclusive of administrative, executive, supervisory and office employees. The terms of this agreement shall be limited in its coverage to such employees. All employees who, on the date of the signing of this agreement, are members of the Union in good standing in accordance with the constitution and by-laws of the Union, and those employees who may thereafter become members shall, during the life of the agreement as a condition of employment, remain members of the Union in good standing.

* * *

Page of Record

106 MOTION (Omitting formal parts)

Now comes the Intervenor, LOCAL 1521, CARPENTERS & JOINERS, A. F. of L., by PADWAY, GOLDBERG & PREVIANT, its attorneys, and moves the Board to dismiss the Petition of the Complainant herein for the reason that this Board does not have jurisdiction of the subject matter of said Petition. That the authority for this motion is *Bethlehem Steel Company vs. New York Labor Board, U. S. Supreme Court, April* 7, 1947, 19 L. R. R. M. 2499, and 12 Labor Cases, Paragraph 51,245.

Dated at Milwaukee, Wisconsin, this 30th day of April, 1947.

107 LETTER (dated May 2, 1947 to Saul Cooper from Secretary of Wis. Employment Rel. Board) (Omitting formal parts)

Your motion filed on behalf of the Intervenor, Local 1521, Carpenters & Joiners, A. F. of L. requesting the Board to dismiss the complaint in the above entitled matter was received by the Board on May 1, 1947. Prior to receipt of this motion and on April 30, 1947, the Board issued and mailed to the parties its Findings of Fact, Conclusions of Law and Order in the case. The Board has directed me to advise you that said Order stands as their answer to your motion.

Page of Record

118-121 JUDGMENT (Omitting formal parts)

118 The above entitled matter having come on for hearing on the 23rd day of June, 1947 before the court without a jury upon the return of the Wisconsin Employment Relations Board, Beatrice Lampert Assistant Attorney General, appearing for the petitioner, Roger C. Minahan of Whyte, Hirschboeck & Minahan appearing for the respondent, Saul Cooper of Padway, Goldberg & Previant appearing for the United Brotherhood of Carpenters & Joiners of America, Local 1521 and Donald J. Martin appearing for Victor Moreau, and the court having heard the arguments and considered the briefs of counsel and being fully advised in the premises and having taken the matter under advisement and having on the 4th day of November, 1947, filed its decision and direction for judgment,

Now, Therefore,

IT IS ADJUDGED AND DECREED that the order of the Wisconsin Employment Relations Board entered on the 30th day of April, 1947 in the matter of Victor Moreau, R. #1, Algoma, Wis. represented by J. J. Gray, 6138 Plankinton Building, Milwaukee, Wis., Complainant v. Algoma Plywood and Veneer Company, Algoma, Wisconsin, Respondent, Case II, No. 1565 Ce-222, Decision No. 1291 be and the same is hereby modified by strik-

119 ing therefrom the paragraph therein numbered as subsection (b) of section 2 of said order requiring

the respondent to make whole Victor Moreau for loss of pay and that the said order as so modified be and it hereby is confirmed and enforced.

IT IS FURTHER ADJUDGED AND DECREED that the Algoma Plywood and Veneer Company, its officers and agents shall immediately:

1. Cease and desist from

(a) Encouraging membership in Local No. 1521, Carpenters & Joiners of America, affiliated with the American Federation of Labor by discriminating in any manner with the hire or tenure of its employes whether they are or are not members in good standing in such labor Union.

(b) Encouraging membership in Local No. 1521, Carpenters and Joiners of America, or any other labor organization, by requiring as a condition of employment that any employe become or remain a member of any such labor organization, as a condition of employment unless and until the employes approve such provision by a referendum as provided in Section 111.06 (1) (c) of the Wisconsin Statutes.

2. Take the following affirmative actions which the Board finds will effectuate the policies of the Act:

(a) Offer to Victor Moreau immediate and full reinstatement to his former, or substantially equivalent, position without prejudice to his seniority or other rights or privileges.

(b) Post at its plant at Algoma, Wisconsin, copies of the notice attached hereto marked Exhibit A. Copies of said notice shall be prepared by the said Algoma Plywood & Veneer Company, signed by the said company's representative and posted by the said company immediately upon receipt of a copy of this order, and maintained by it for thirty (30) consecutive days thereafter in conspicuous places, including all places where notices to employes are customarily posted.

(c) Notify the Wisconsin Employment Relations Board in writing within five (5) days from the date of receipt of a copy o fthis judgment what steps the company has taken to comply therewith.

Dated November 21, 1947.

BY THE COURT

Edward M. Duquaine

Circuit Judge

Page of Record

121

EXHIBIT A

NOTICE TO ALL EMPLOYES

Pursuant to an order of the Wisconsin Employment Relations Board, we hereby notify our employes that we will not in any manner interfere with their rights to self-organization and to form, join or assist any labor organization of their choice. That we will not require any of our employes to become or remain members of Local No. 1521, Carpenters and Joiners of America, affiliated with the American Federation of Labor, or any other labor organization as a condition of employment; that we will not enforce or attempt to enforce any provision contained in any written collective bargaining agreement between our company and Local No. 1521, Carpenters and Joiners of America, affiliated with the American Federation of Labor, which requires as a condition of employment that all employes who were members of such union on the 5th day of April, 1946, or have since become members of such union, must maintain their membership in good standing; we will offer to Victor Moreau immediate and full reinstatement to his former, or substantially equivalent, position without prejudice to any seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of such discrimination.

Page of Record

All of our employes are free to join or assist labor organizations of their choice, or to refrain from such activities. All of them are free to become and remain members of Local 1521, Carpenters and Joiners of America, or any other labor organization, or to refrain from any organizational activities. We will not discriminate in regard to hire, or tenure of employment or any term or condition of employment against any employe because of membership in or activities on behalf of any labor organization, or the failure to maintain membership in any labor organization.

ALGOMA PLYWOOD AND
VENEER COMPANY
By .....

109-113 DECISION (Omitting formal parts)

109 Victor Moreau, an employee of Algoma Plywood and Veneer Company, ceased his employment with the company when the matter of the enforcement of the "maintenance of membership" clause of the labor contract existing between the company and the United Brotherhood of Carpenters and Joiners, Local No. 1521 (AFL) was raised. He was then a member of the union and had been since before the contract was made. He brought proceedings before the Wisconsin Employment Relations Board against the company, his complaint of an unfair labor practice being

Page of Record

predicated on the proposition that he was discharged pursuant to the maintenance of membership clause in the contract which was invalid under Wisconsin law because not ratified by the employees in accordance with sec. 111.06 (1) (c). The union intervened in the proceedings.

The Board found with Moreau, entering the usual order in such case requiring the employer to reinstate him with back pay less his earnings elsewhere.

The Board has petitioned under sec. 111.07 (7) for enforcement of the order. The company and the union have petitioned for a review of the said order under sec. 111.07 (8) and Chapter 227 of the Statutes.

110 In my opinion each and every finding of fact of the Board is supported by credible and competent evidence or by reasonable and proper inferences from the established facts and, therefore, may not be disturbed. *Retail Clerks Union v. WERB,* 242 Wis. 21. As to the contention of the company and the union that Moreau voluntarily quit his job, I do not perceive how the evidence may be considered as warranting any conclusion other than that drawn by the Board.

The company and the union both take the position that under the Bethlehem Steel Company Case the National Labor Relations Board and not the WERB had jurisdiction. I consider that the question of jurisdiction must be resolved in favor of the Wisconsin Board under the decision of our

Page of Record

Supreme Court in *International Union v. WERB*, 250 Wis. 550. The opinion in that case considers the limits of the Bethlehem Steel Company decision.

I think clearly that the contract effective April 29th, 1946, and which was the current contract when Moreau's employment ceased must stand on its own feet as a new contract and that validity of the maintenance of membership clause may not be sustained on the theory that the clause was valid when it originally became a part of the annual labor contract. Each renewal constituted a new contract.

As to the conclusions of law, the difficulty I find is in sustaining that part of Conclusion of Law No. 3, which recites that the termination of Moreau's employment, which was brought about by reason of his failure to maintain membership in the union, "constituted discrimination by the company in regard to the hire or tenure of employment of said Victor Moreau," insofar as such discrimination may be taken as sufficient justification for the back pay order.

After this case was argued and briefs were filed, the Court asked for further briefs covering the question of whether Moreau's membership in the union when the contract was made affected his right to the relief granted by the Board. This question was submitted on the assumptions (1) that Moreau was a member of the union in good

Page of Record

standing when the contract dated April 5th, 1946, was made; (2) that the presence of the clause in the contract resulted from the demand of the union with the acquiescence of the company; (3) that Moreau's severance of employment would not have occurred were the clause not in the con-
111 tract, but on the other hand resulted from the terms of the clause being carried out; and (4) that the company's participation in the execution of the clause was only such as its good-faith observance of the terms of the clause required. Those assumptions are undoubtedly true.

In *International Union, Etc., v. WERB*, 245 Wis. 417, Bezie, the complainant, was an old employee and was a member of an AFL union. The company entered into a contract with a CIO union which provided that new employees at the end of the probationary period be required either to join the union or secure a working permit, and that old employees, such as Bezie, who were not members of the CIO union secure a working permit. Bezie was discharged for not being either a member of the CIO union or securing a working permit. The Court said, at page 432:

> "The contract provides that employees who were members of the union at the time it was entered into should retain their membership and keep in good standing in the union, which implies payment of dues, or be discharged. This certainly encourages membership in the union."

Page of Record

At page 434 the Court said:

> "We consider also that the inference that the union as the bargaining agent induced the company to make the contract is warranted. Obviously the contract is to the advantage of the union and of its employee members. This being so it is a fair inference that the bargaining committee initiated the negotiations for the provision. The board was thus warranted to find interference by the union with the right of Bezie and other employees to refrain from becoming members of the union or assisting its activities by taking out a permit, and by so doing the union committed an unfair labor practice."

It is to be noted that in the last cited case the complaining employee, Bezie, was not a member of the union with which the labor contract was made, which union together with the employer were held to be guilty of an unfair labor practice by reason of the existence in the labor contract of a maintenance of membership clause.

Since the maintenance of membership clause in the contract is invalid, the authority of the Board to restore Moreau to his employment is clear. Whether restoration should include visiting a penalty on the employer in the form of a back pay provision presents a different question.

In *National Licorice Company v. National Labor Relations Board*, 309 U. S. 350, 84 L. ed. 799, 60 S. Ct. 569, the Court said:

Page of Record

112 "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees, as the means of defeating the statutory policy and purpose. Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes * * *"

It is difficult to see where the employer in the instant case gained any advantage. In this connection certain allegations of the employee contained in the memorandum accompanying the complaint are of interest. It is there stated:

"Both Mr. Yerkes and Mr. Fulwiler admitted that the maintenance of membership clause was illegal, but stated that it had been ordered on them by the War Labor Board against their wishes and that we could rest assured that when the contract again came up that this matter would be settled by the Wisconsin Employment Relations Board. Mr. Yerkes' position was that he was caught between two fires; that he either had to violate the laws of the State of Wisconsin or violate his contract, and that he preferred that this matter be referred to the Wisconsin Employment Relations Board for determination."

Page of Record

Among the cases relied upon by the Attorney General to support the Board's order in full are *Sperry-Gyroscope Co. v. National Labor Relations Board*, 129 Fed. 2d 922, *National Labor Relations Board v. Empire Worsted Mills, Inc.*, 129 Fed. 2d 668, and *National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc., et al*, 315 U. S. 685, 691, 62 S. Ct. 846, 10 L. R. R. 204. In each of these cases a company-dominated union was involved. Good reason exists why an employer dealing with a company-dominated union should not be permitted to set up any of the terms of a labor contract by way of defense to the enforcement of the law and the imposition of the usual penalties. The union here, however, is not a company-dominated union. No reason exists why the company should be held wholly to blame for the existence of the maintenance of membership clause, while members of the union who were members in good standing at the time the contract was made should be completely relieved from any responsibility.

Counsel for the union, while insisting that jurisdiction over the unfair labor practice here involved resided with the national Labor Relations Board and not with the WERB, had this to say
113 in his brief with respect to the back pay order of the Board:

> "Assuming, but not admitting, that Chapter 111 of the Wisconsin Statutes is applicable, then the Board erred in awarding back pay since the claimant should not be permitted to benefit by

Page of Record

his own recission of the contract of employment. The Board cannot declare the contract unenforceable and in the next breath award Moreau the emoluments of the same contract. By doing so it is permitting an award to the employee for the accomplishment of a contract at the request of his own agent, in which the employer acceded. Under these circumstances such an award would not accomplish the purpose of the Wisconsin Employment Peace Act."

In *Folding Furniture Works v. Wisconsin Labor Relations Board*, 232 Wis. 170, the Court says:

"It was held under the National Labor Relations Act that back pay cannot be ordered as a reward to employees, but only as a penalty against the employer as a means of preventing unfair labor practices. *National Labor Relations Board v. Carlisle Lumber Company* (9th Cir.) 99 Fed. 2d 533. Back pay may not be ordered under the rule of that case unless such order will effectuate the policies of the National Labor Relations Act. * * * The ruining of business enterprises and the confiscation of their plants is not the policy of the Wisconsin Labor Relations Act."

None of the counsel for the respective parties has cited any case that might be considered as directly ruling the point here involved. I consider that under the equities of this case it cannot be considered that back pay "will effectuate the policies" of the State Act. Fault for the retention of the clause in the contract must as a matter of

Page of Record

realism be attributed principally, if not wholly, to the union. This union was Moreau's union. He was a dues-paying member when the contract was signed. The union agents were his agents. The order of the Board insofar as it orders back pay imposes a penalty on the employer, whose fault in the premises is little, if any, compared to that of the union. I do not consider that the Board had authority in this case to include in the order paragraph 2 (b), which reads:

> "Make whole Victor Moreau for any loss of pay that he may have suffered by reason of the company's discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned in wages during the period from the date of his discharge to the date of the company's offer of reinstatement, less the net earnings and unemployment compensation he may have had during such period."

The order of the Board will be modified by striking therefrom said paragraph 2 (b); otherwise, it will be affirmed.

114

Dated this 4th day of November, 1947.

By the Court,

EDWARD M. DUQUAINE s/
Circuit Judge.

And afterwards to-wit: on the 14th day of April, A. D. 1948, the same being the 56th day of said term; the following proceedings were had in said cause in this Court:

Wisconsin Employment Relations Board,
Plaintiff,
vs.
Algoma Plywood and Veneer Company,
Defendant.

Kewaunee Circuit Court

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Beatrice Lampert, Assistant Attorney General, and Donald J. Martin, Esq., for the said plaintiff and appellant, and by Roger Minahan, Esq., for the said defendant and respondent, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

And afterwards to-wit: on the 11th day of May, A. D. 1948, the same being the 64th day of said term; the judgment of this court was rendered in words and figures following, that is to say:

Wisconsin Employment Relations Board,
Plaintiff,
vs.
Algoma Plywood and Veneer Company,
Defendant.

Kewaunee Circuit Court.

Opinion by Justice Wickhem.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Kewaunee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Kewaunee County, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

And that this cause be, and the same is hereby, remanded to the said Circuit Court for the entry of judgment in accordance with the opinion.

Thereupon the opinion of the Court by JUSTICE WICKHEM was filed in words and figures following, that is to say:

STATE OF WISCONSIN IN SUPREME COURT

August Term, 1947

No. 189.

WISCONSIN EMPLOYMENTS RELATIONS BOARD,
Plaintiff,

v.

ALGOMA PLYWOOD & VENEER COMPANY,
Respondent.

FILED MAY 11, 1948
ARTHUR A. McLEOD
Clerk of Supreme Court
Madison, Wis.

Appeals from a portion of the judgment of the circuit court for Kewaunee county, Edward M. Duquaine, circuit judge. *Affirmed* in part and *reversed* in part.

An action was commenced on November 5, 1947 by Wisconsin Employment Relations Board against Algoma

Plywood and Veneer Company to enforce an order theretofore made by the board. The appeal is by the Wisconsin Employment Relations Board from that portion of the judgment which modifies the board's order by striking a provision requiring the employer to pay back pay in addition to reinstating the employee involved.

There is a motion by Algoma Plywood and Veneer Company to review that portion of the order which sustains the jurisdiction of the board. Hereafter the Algoma Plywood and Veneer Company will be referred to as "the company"; the Wisconsin Employment Relations Board as "the board" and Victor Moreau whose rights are under question in this action will be referred to as "the employee." The Carpenters and Joiners, A. F. of L. Local No. 1521 will be referred to as "the union."

The material facts will be stated in the opinion.

WICKHEM, J. The company is a manufacturing concern operating in the city of Algoma and having approximately 650 production workers. In 1942 the union was designated as bargaining agent by a majority of the company's employees in an election conducted by the National Labor Relations Board. Since that time it has entered into contracts with the company concerning wages, hours and working conditions. On April 5, 1946 a contract was executed which contains the following provisions:

"* * * All employees who, on the date of the signing of this agreement, are members of the Union in good standing in accordance with the constitution and by-laws of the Union, and those employees who may thereafter become members shall, during the life of the agreement as a condition of employment, remain members of the Union in good standing."

This provision had been inserted in the 1943 contract and was included in all contracts thereafter negotiated. It was inserted in the 1943 contract upon the recommendation of a federal conciliator in accordance with an alleged policy of the War Labor Board but no directive of this board was ever issued requiring the inclusion of such a provision. It was the practice in enforcing the provision for the union to notify the company of delinquencies on the part of any employee in respect of his dues. The company would then interview the delinquent employee and take whatever steps were necessary to restore his membership to good standing and failing that would discharge him.

The employee began to work for the company steadily in October, 1945 but had been employed from time to time prior to that time. On one occasion in 1944 he had been reported by the union as delinquent and ordered to leave work but he paid his dues and was restored to this job. Thereafter he maintained his membership until early in 1947 when he received a notice from the union stating that he was in arrears and that if he was not paid up within a week that would "be your last day of work and you will also be fined $1." He did not pay his dues and was ordered to report to the vice-president of the company. He there stated that he would quit before he would pay and indicated dissatisfaction with the union. He was then discharged.

Upon these facts the board ordered that the company cease from encouraging membership in the union by any discrimination in respect of the hire or tenure of its employees or by requiring as a condition of employment that any employee become or remain a member of the union unless and until the employees shall have approved such

provision by referendum under sec. 111.06(1)(c) Stats. The company was required to take the following affirmative action: (1) reinstate employee; (2) pay employee a sum of money equal to the amount he normally would have earned in wages during the period from his discharge to the date of the company's order of reinstatement, less earnings he may have had during such period; (3) post the usual notices; (4) notify the board within five days of the steps taken to comply with the order.

Thereafter, on November 5, 1947 the board petitioned the circuit court for enforcement of its order and the judgment in this case reversed that portion of the order requiring the company to make the employee whole for loss of pay. Otherwise the order was confirmed and enforced. Both union and employer contend that the board was without jurisdiction for the reason that the National Labor Relations Board in supervising the election for bargaining agent and certifying the union as such had so intervened in the labor relations of the company as to oust the Wisconsin board of jurisdiction.

As pointed out in *Allen-Bradley Local* 1111 *v. Wisconsin E. R. Board*, 237 Wis. 164, 295 N. W. 791 we are again confronted with a question of delicacy and difficulty concerning "the delimitation of the power of the state and the federal government over a matter which is subject to some extent to their concurrent jurisdiction." See also *International B. of E. W. v. Wisconsin E. R. Board*, 245 Wis. 532, 15 N. W. (2d) 823. The question first came before this court in *Wisconsin Labor R. Board v. Fred Rueping L. Co.*, 228 Wis. 473, 279 N. W. 673. At that time there was in force in this state a labor relations act substantially identical to

all important respects with the Wagner Act. The question was whether the Wisconsin Board had jurisdiction to consider and to determine proceedings initiated under the Wisconsin Act by employees charging unfair labor practices on the part of an employer. This court held that the state had power to regulate labor relations in the interest of the peace, health and order of the state and that the federal government had the power to "regulate this relationship to the extent that unregulated it tends to obstruct or burden interstate commerce." It was conceded that in the field where there was an overlapping of jurisdiction the federal power was supreme and that the federal statute could preempt this field. It was held, however, that the National Labor Relations act had not preempted the field and in view of the discretion in the National Labor Relations Board to take or to refuse jurisdiction in accordance with its determination whether the situation proximately affected Interstate Commerce it was held that the state was ousted of jurisdiction only where there was an administrative conflict created by the intervention of the National Labor Relations Board. It was unnecessary to determine what the situation might be if the state act had been in any way repugnant to the policy and purposes of the National Act. The *Rueping* Case did not involve any intervention by the National Labor Relations Board and this court did not consider what would constitute such an administrative intervention by the National Board as would oust the Wisconsin Board of jurisdiction. The *Allen-Bradley Case*, supra, arose under the Wisconsin Employment Peace Act which was different in several important particulars from the so-called Little Wagner Act. Among other things it defined unfair labor prac-

tices by employees and in several other respects departed from the provisions of the former statute. It was contended in the *Allen-Bradley* Case that the Wisconsin Employment Peace Act was repugnant to the purpose and policy of the National Labor Relations Act and that for that reason it could not be enforced in the face of the federal enactment. It was held that at least so far as unfair labor practices by employees was concerned the Employment Peace Act covered a field not dealt with by the national act or within the jurisdiction of the National Labor Board and that there was no conflict fatal to the jurisdiction of Wisconsin. It was intimated that mere repugnancy in the language of the two acts did not go to the matter of jurisdiction and that there could be no conflict even in such a situation until it was attempted to apply them to the same labor dispute. The *Allen-Bradley* Case was appealed to the United States Supreme Court and was affirmed. *Allen-Bradley Local v. Board,* 315 U. S. 740. The opinion was put upon quite narrow grounds and the court deliberately avoided the question whether the Wisconsin view that jurisdiction was wholly dependent upon administrative conflict was valid. It was held, however, that a state law so construed and applied as to delete, impair or defeat the rights declared by the National Labor Relations Act would be unconstitutional but it was held that the court would not consider the state ct as a whole but rather the parts of it applied in the case involved and that the conflict with the federal act must be found in those very parts. It was held that since the federal act did not govern employer-union activity of the type involved in the *Allen-Bradley* Case the portions of the Wisconsin Act under attack constituted a valid exercise of

jurisdiction. It was stated that if the order of the state board had affected the status of employees or caused a forfeiture of collective bargaining rights a different question would arise.

We now come to the case of *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 67 S. Ct. 1026. That case dealt with a situation in which the New York State Labor Board had permitted foremen to organize to constitute a collective bargaining unit. The question whether foremen should consistently with the policy of the national act be organized as a bargaining unit had had various solutions by the national board. In the beginning it had recognized the rights of the foremen and "later, there was a period when, for policy reasons but without renouncing jurisdiction, it refused to approve foreman organization units." The application of the foremen to the state board was the result of this policy on the part of the national board. Later during the pendency of the case in the courts of the state of New York the Supreme Court in *NLRB v. Packard Motor Car Company*, 330 U. S. 485, 67 S. Ct. 789 had held that the national act entitled foremen to the rights of self-organization under the act. The court in the *Bethlehem* Case follows the decision in the *Allen-Bradley* Case to the effect that in the national act congress has "sought to reach some aspects of the employer-employee relation out of which such interferences arise. . . . Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under

compulsion of the state," citing the *Allen-Bradley* Case. It was held, however, following the case of *Hill v. Florida*, 325 U. S. 538, 65 S. Ct. 1373 that "the power of the state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'." The court concluded that where Congress has implemented the act by the delegation of rulemaking power to an administrative body and where that body in the exercise of its delegated power has adopted a rule of policy the state power is abrogated, at least so far as the subject matter of the rule is concerned. While the state regulation in some fields may be invalid even though a particular phase of the subject has not been covered by rule it was held that where the measure in question relates to what might be considered a separate or distinct segment of the matter, the states are generally permitted to exercise their police power as to the matters omitted by the administrative rules. It is said, however, that "the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." The court points out that the failure of the National Labor Relations Act to entertain the foremen's petitions was of the latter class; that the board had never denied its jurisdiction over the petitions and had made it clear that its refusal to designate foremen's bargaining units "was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes." The court then says:

"The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. . . . We do not believe this leaves room for the operation of the state authority asserted."

This court was called upon in *International Union v. Wisconsin E. R. Board*, 250 Wis. 550, 28 N. W. (2) 254 to appraise the effect of the Bethlehem Case. We there concluded that the *Bethlehem* Case had simply held that the National Labor Relations Board in the instant Case "had exercised the jurisdiction delegated to it under the federal act by declining to designate the foremen as a bargaining unit. The declination was an exercise of its jurisdiction, just as much as granting it would have been." We adhere to this determination. The *Bethlehem* Case has limited the case-by-case doctrine commonly attributed to the Wisconsin decisions only to the extent of holding that where there has been a valid general exercise of its administrative power by the National Labor Relations Board neither repugnant provisions of the state law nor repugnant policies of the state board are effective to defeat the purpose and policy of the exercise. See "The Taft-Hartley Act and State Jurisdiction Over Labor Relations," Russel A. Smith, 46 Michigan Law Review 593 at 609 where in commenting upon the *Bethlehem* Case it is said:

"On its facts the case is easily understood simply as an application of the doctrine that state regulation cannot be permitted to frustrate national policy—in this situation a

policy definitely adverse to foremen unionization, not merely neutral in the matter."

We next consider the consequences of the fact that the union here had been certified as a collective bargaining unit by the National War Labor Board. This circumstance was not present in the *Rueping* or *Allen-Bradley* Cases or *Hotel & R. E. I. Alliance v. Wisconsin E. R. Board*, 236 Wis. 329, 294 N. W. 632, 295 N. W. 634. In the *International B. of E. W.* Case, the National Labor Relations Board had dismissed a petition for investigation and certification of bargaining representative and we there held that the board had not taken jurisdiction. *International Union v. Wisconsin E. R. Board*, supra, involved a question of unfair labor practices by employees who were members of a union which had been certified as a bargaining unit by the National Labor Relations Board. This case also involves such a certification and the question is whether there was such an intervention by the National Board as even under the doctrine of the *Rueping* Case would oust the state and the state board of all jurisdiction concerning the employment relations of this company. We assumed a negative answer in the *International Union* Case, supra, without any discussion of the point. Upon consideration we adhere to the view that the mere certification of a union as a bargaining unit in a particular plant is not such a general assumption of jurisdiction over all of the employment relations of the company as would oust the state board of all jurisdiction. We refrain from expressing any opinion as to the extent to which it does oust the state board in the field that might be regarded as collective bargaining. In other words the ques-

tion reserved by the United States Supreme Court in the *Allen-Bradley* Case as to the consequences there had the board's order effected a forfeiture of collective bargaining rights will not be discussed because it is not involved. It remains to be considered, however, whether the fact that the contract was originally entered into as a result of collective bargaining supervised by the National War Labor Board and the clause under attack here inserted at the recommendation or insistence of a conciliator of the board and in accordance with a general policy not formalized by rule or directive brings the case within the rule of the *Bethlehem* Case as we have construed it. The question presents some difficulty but we have concluded that it does not have this effect. In *International B. of E. W.* Case this court held that sec. 8 (3), 29 USCA 158(3) had not validated or authorized an all-union agreement. As we construed the statute in the light of its language and the committee report accompanying it the section simply makes it clear that an all-union contract negotiated by a representative of the employees is not repugnant to the purposes of the National Act. It was not intended to interfere with the policy of the various states in respect of closed shop and all-union agreements. Under the circumstances we are of the opinion that there was not delegated to either the War Labor Board or to the National Labor Relations Board any jurisdiction to declare a policy in respect of maintenance of membership, closed shop or all-union shop and that even if the War Labor Board had issued a formal directive it would be *ultra vires* the board and have no effect upon the jurisdiction of the Wisconsin Board, unless, indeed, it fell within some aspect of the war power, a matter which we have not in-

vestigated and which is not briefed but which is not material for the reason that the contract was renegotiated after the war powers if any there were had ended. In connection with this point see *International B. of P. M. v. Wisconsin E. R. Board*, 245 Wis. 541, 15 N. W. (2) 823.

The next question has to do with the portion of the orders requiring the employer to make the employee whole for loss of pay resulting from his discharge. The trial court held that in this case the board abused its discretion and ordered the provisions for back pay to be deleted from the order. The statute involved in sec. 111.07(4) which authorizes the board to take the following remedial action:

"* * * Final orders may * * * require the person complained of to cease and desist from the unfair labor practices found to have been committed * * * and require him to take such affirmative action, including reinstatement of employes with or without pay, as the board may deem proper . . ."

It was held by this court in *Folding Furniture Works v. Wisconsin L. R. Board*, 232 Wis. 170, 285 N. W. 851 in the course of reversing an order held to be excessive in amount that "we consider that requiring an offer to reinstate the men was proper, and an order for payment of a reasonable amount of back pay, to those who accepted the offer, based upon what was deemed necessary to 'effectuate the policies' of the act, would have been proper." It was further stated that the order for back pay is not a reward to employees but is penal and remedial for the purpose as stated by the United States Supreme Court in *Consolidated Edison Co. v. National Labor Relations Board* of removing or avoiding the consequences of violation where those consequences

are of a kind to thwart the purposes of the act." In the *Folding Furniture Co.* Case the award was reversed because it involved many employees and the enormity of the award would tend to bankrupt the employer rather than to induce compliance with the act.

We deal here with a matter committed by statute to the discretion of the board and in order to reverse we must find that the order had no reasonable tendency to effectuate the purposes of the act. In this connection see *Christoffel v. Wisconsin E. R. Board*, 243 Wis. 332, 10 N. W. (2d) 197; *Appleton Chair Corp. v. United Brotherhood*, 239 Wis. 337, 1 N. W. (2d) 188. We are of the view that this cannot be said. A great deal of emphasis is laid by the employer upon the fact that it acted under a certain degree of compulsion in putting the questioned clause into the contract; that in order to conduct its business without labor troubles it was prudent to yield to the demand of the union which was supported by the federal conciliator. It must be at once apparent, however, that if that operates as such a complete excuse for committing an unfair labor practice as to make the ordering of back pay improper the employer may in the future yield with impunity to such pressures. What the board has done is to impose such penalty as would in its judgment be likely to retard the employer's inclination to yield to this compulsion in the future. We cannot say that the board might not reasonably consider that its action would tend to effectuate the policy of the act. It is also contended that it is unfair to visit the entire consequences of the situation upon the employer. However, the term "backpay" in its ordinary sense and as used in the statute clearly indicates that its source is the employer and that it

is not an appropriate penalty to visit upon the union. We think that this objection is without validity.

It follows that the judgment of the trial court should be affirmed in so far as it sustains the jurisdiction of the board and reversed with directions to enforce the portion of the board's order dealing with back pay.

By the Court.—Judgment affirmed in part and reversed in part and cause remanded for the entry of judgment in accordance with the opinion.

STATE OF WISCONSIN
IN SUPREME COURT.

Wisconsin Employment Relations Board,
Plaintiff,

vs.

Algoma Plywood and Veneer Company,
Defendant.

I, ARTHUR A. McLEOD, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the proceedings now on file and of record in my office with all things concerning the same in the above entitled cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Madison, this 21st day of July, A. D. 1948.

ARTHUR A. McLEOD
Clerk of Supreme Court, Wisconsin.

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI. Filed October 11, 1948.

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted, and the case is assigned for hearing immediately following Nos. 38 and 39 which are assigned for hearing immediately following Nos. 14 and 15.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.